this person and others having a penchant towards this type of crime. The order of the magistrate is therefore set aside and instead thereof I pass sentence on him of 1 year's imprisonment with effect from today and 6 strokes of the rattan. Stronger medicine will be dosed out to those committing extortion who come before the courts in future.

*Order accordingly.*

## *RE* ABU KASSIM

**[R.Cr.J. (Gill J.) November 27, 1963]**

**[K.L. — Criminal Revision No. 11 of 1963]**

*Criminal Procedure—Charge framed under repealed statutory provision—Whether conviction valid.*

*Immigration—Immigration Ordinance, 1959, ss.15(1) & 58(2)—Charge under repealed section—Proceedings commenced without sanction of Public Prosecutor or Comptroller of Immigration.*

The accused was charged and pleaded guilty to an offence under regulation 15(3) of the Immigration Ordinance, 1959, at a time when the said regulation had already been repealed.

**Held:** the conviction must be set aside.

**Per curiam:** for valid criminal proceedings to be instituted under section 15(1) of the Immigration Ordinance, 1959 the sanction of the Public Prosecutor or the Comptroller of Immigration must be obtained.

CRIMINAL REVISION.

*Ibrahim bin Salleh* (Deputy Public Prosecutor) for Public Prosecutor.

Accused in person.

**Gill J.:** This case has been brought to my notice by the Public Prosecutor for purposes of revision.

The accused Abu Kassim bin Kung, an Indonesian, was charged in the Magistrate's Court, Kuala Lumpur, on the 21st day of October, 1963 as follows:

"That you on 19.10.1963 at about 11.00 p.m., at Reno Hotel, Kuala Lumpur, in the State of Selangor, did remain in the Federation of Malaya, after the expiry of your permit No.71254 issued by the Inspector of Immigration, Port Swettenham on 16.10.1963, to wit was valid until 9.00 a.m. 19.10.1962 and that you have thereby committed an offence under regulation 15(3) of Immigration Ordinance, 1959 and punishable under section 57 of the said Ordinance."

To the above charge the accused pleaded guilty. Sentence was postponed to 28th October, 1963 when he was sentenced to imprisonment for three months to be followed by an order of deportation. It is apparent from the record that the accused was charged under a section of the Immigration Ordinance, 1959 which had been repealed. Moreover, no sanction of the Comptroller of Immigration or the Public Prosecutor, as required by section 58(2) of the Ordinance, was obtained for the purpose of instituting the criminal proceedings against the accused. I therefore set aside his conviction and sentence on the charge as framed against him in the Magistrate's Court.

The accused has now been produced before me on this application for revision and Enche' Ibrahim bin Salleh, Deputy Public Prosecutor, has produced the necessary sanction and a fresh charge as follows has been framed against the accused:

"That you on 19th October, 1963 at about 11.00 p.m. at Reno Hotel, Kuala Lumpur, in the State of Selangor, did remain in the Federation of Malaya, after the expiration of permit No. 71254 issued by the Inspector of Immigration, Port Swettenham dated 16th October, 1963, in contravention of the provisions of section 15(1) of the Immigration Ordinance, 1959 and you have thereby committed an offence punishable under section 57 of the said Ordinance."

The accused has pleaded guilty to this charge. I convict him on his plea and sentence him to three months' imprisonment with effect from 28th October, 1963, to be followed by his deportation to Indonesia.

*Order accordingly.*

## COELHO v. THE PUBLIC SERVICES COMMISSION

**[O.C.J. (Ong J.) November 28, 1963]**

**[K.L. — Originating Motion No. 10 of 1960]**

*Contract—Public Services Commission inviting applications for posts—Invitation by newspaper—Qualified acceptance of application not communicated to applicant—Whether on probation—Subsequent termination of applicant's appointment as officer on probation—Whether Commission acted ultra vires.*

*Master and Servant—Dismissal—Whether ultra vires.*

*Certiorari—Order of, to quash decision of the Public Services Commission.*

The applicant a Health Inspector under the Town Board, Tanjong Malim applied for the post of Assistant Passport Officer in the Federation of Malaya Government Oversea Missions advertised in the *Malay Mail* newspaper dated February 19, 1957 as follows:—"Applicants will be selected according to the following order of preference: (i) Serving Assistant Passport Officer and serving Junior Assistant Passport Officers in the Immigration Department who have had not less than 5 years' service and possess School Certificate. (ii) All serving Government Officers who have had 5 years' service and who possess School Certificate....Officers will be eligible for overseas allowance when abroad....Free passages to overseas posts ....Free medical (but not dental) attention....Outfit allowances....Applications (those from serving Officers to be submitted through Heads of Department with Confidential Reports and Record of Service) to reach the Secretary, Public Service Commission (Designate), Young Road, Kuala Lumpur, 28th February, 1957." Consequently the applicant was informed that he was accepted and after undergoing a period of training he was posted to the Immigration Office, Kuala Lumpur until December 1958 when he was transferred to the Immigration Office at Johore Bahru. On November 5, 1959, the Secretary to the Public Services Commission in a letter addressed to the applicant as "Assistant Passport Officer on Probation" informed him that following a report from the Controller of Immigration concerning his conduct in the irregular issue of certain passports disciplinary action was being taken against him with a view to his dismissal. The applicant made representations as invited by the said letter and on December 24,

1959, the applicant was informed that the respondent had decided that he should not be dismissed but that his appointment on probation be terminated forthwith by payment of one month's salary in lieu of notice. The applicant now moved the court for an order of *certiorari* to quash the decision of the respondents on the grounds of error in law, want of jurisdiction and failure to observe the principles of natural justice.

**Held:** the *Malay Mail* advertisement was an invitation to qualified persons to apply and the resulting applications were offers. The information conveyed to the applicant was an unqualified acceptance to join the overseas mission and he so understood it and no mental reservation or tacit misunderstanding on the part of the respondents should be permitted to destroy the contractual obligation. The respondents therefore acted *ultra vires* in purporting to terminate the applicant's services in the manner applicable to officers on probation.

*Case referred to:—*

(1) *Solle* v. *Butcher* [1950] 1 K.B. 671.

APPLICATION for leave to apply for an order of *certiorari.*

*C. C. Rasa-Ratnam* for the applicant.

*Au Ah Wah* (Treasury-Solicitor) for the respondents.

*Cur. Adv. Vult.*

**Ong J.:** The applicant, having obtained leave from Adams J., now moves the court for an order of *certiorari* to quash a decision of the respondents, the Public Services Commission, dated December 24, 1959, terminating forthwith the appointment of this applicant as Assistant Passport Officer in Oversea Missions of the Federation of Malaya Government by payment of one month's salary in lieu of notice.

There is no dispute as to any of the material facts. On February 19, 1957 an advertisement in the *Malay Mail* newspaper invited applicants for posts of Assistant Passport Officer for service in Federation of Malaya Government Oversea Missions. It was couched in the following terms:

"Applicants will be selected according to the following order of preference: (i) Serving Assistant Passport Officers and serving Junior Assistant Passport Officers in the Immigration Department who have had not less than 5 years' service and possess School Certificate. (ii) All serving Government Officers who have had 5 years' service and who possess School Certificate. (iii) Persons not in Government Service who have School Certificate with a credit in English, and who have attained the age of 22 but have not attained the age of 30. Salary scale $462 x 20 — 562. Officers will be eligible for overseas allowance when abroad (in lieu of Malayan cost of living allowance), cost of living allowance at current rates is payable for service in Malaya, (when overseas allowance is not payable). Free passages to overseas posts will be paid on approved terms. Free housing, or an approved allowance instead, will be provided. Free medical (but not dental) attention. Outfit allowances at approved rates may be claimed. Applications (those from serving officers to be submitted through Heads of Department with Confidential Reports and Record of Service) to reach the Secretary, Public Services Commission (Designate), Young Road, Kuala Lumpur, 28th February, 1957."

The applicant was then a Health Inspector under the Town Board, Tanjong Malim. He had been in the service of the Perak State Government since 1949 and thus came within category (ii). His application accordingly came to be made through the Chairman of the Town Board, Tanjong Malim.

Notice of his selection by the Public Services Commission (Designate) was conveyed to the State Secretary, Perak, by a letter dated June 3, 1957 from the Controller of Immigration, Federation, which was as follows:

"IMMIGRATION OFFICE,
P.O. BOX 442,
PENANG.

No.IMM/HQ/28/56
Tel: 62337
SEC. (S) 660/57

3rd June, 1957.

The Honourable
The State Secretary,
Perak, IPOH.

With reference to your (93) in Pk. Sec. (S) 10/57 dated 16.3.57 forwarding an application from Mr. Meredith Coelho, Health Inspector, T. Malim, for appointment as Assistant Passport Officer in Oversea Missions of the Federation of Malaya Government, I have to inform you that he has been selected by the Public Service Commission (Designate) for the appointment applied for.

2. He will start on the initial salary of the scale i.e. $462 p.m. and serve a probationary period of three years with effect from the date he assumes duty with this department (for training).

3. Will you therefore please let me know as soon as possible, when he can be released from your department to enable him to report for duty to the Deputy Controller of Immigration, Kuala Lumpur.

4. These Assistant Passport Officers are required urgently for training for duties overseas soon after Merdeka. Your co-operation in allowing Mr. Meredith Coelho early release will be much appreciated.

(Sd.) D. W. Bigley
Controller of Immigration
Federation.

c.c.

D.C.I., K.L."

The State Secretary replied to the Controller of Immigration on June 27, 1957. Copies of his letter were also addressed respectively to the Deputy Controller of Immigration, Kuala Lumpur and to the Chairman of the Tanjong Malim Town Board for their information and necessary action. On the Town Board Chairman's copy of such letter appear certain minutes addressed to the applicant by or on behalf of the Chairman on June 28, 1957, and those made by the applicant himself. The Chairman's copy of the letter is reproduced in full below:

"Ref: No. (6) in T.B.T.M. 56/57

27th June, 1957.

No. (2) in Pk. Sec. (S) 660/57

Sir,

Appointment of Mr. Meredith Coelho, Health Inspector, Tanjong Malim, as Assistant Passport Officer in Oversea Missions of the Federation of Malaya Government.

..... .....

I am directed to refer to your memo No. IMM/HQ/28/56 dated the 3rd June, 1957, on the above subject and to inform you that Mr. Meredith Coelho will be

released at the end of this month to enable him to assume duty with your Department for training with effect from 1st July, 1957.

I am, Sir,
Your obedient servant,
(Sd.) Raja Abdul Aziz
for State Secretary
Perak.

The Controller of Immigration,
Federation of Malaya,
P.O. Box 442,
PENANG.

c.c.
The Dy. Controller of Immigration, Kuala Lumpur.

c.c.
The Chairman, Town Board, Tanjong Malim.

Forwarded for information and necessary action.

2. Arrangements are being made separately to replace Mr. Coelho by another Health Inspector.

(Sd.) Raja Abdul Aziz
for State Secretary,
Perak.

Mr. Coelho,

You may leave on 30th June but arrange to come back for a handover when the new Health Inspector reports here.

(Sd.) A. Majid
28/6

Chairman, Town Board.

Noted, Thank you.

(Sd.) M. Coelho."

From the above two letters it is clear (and not denied by the respondents) that (1) Mr. Bigley did not send a copy of his letter to the applicant (2) no copy thereof was sent by the State Secretary, Perak to the Town Board Chairman. Consequently, all that the applicant knew, or had means of informing himself, was that his application had been accepted and that he had been selected for the appointment.

The arrival of the relieving Health Inspector having been delayed for a few days, the applicant assumed the duties of the new appointment at Kuala Lumpur on July 9, 1957 instead of June 30. After undergoing a period of training at the Government Staff Training Centre in Kuala Lumpur, the applicant was posted to the Immigration Office, Kuala Lumpur, until December 1958 when he was transferred to the Immigration Office at Johore Bahru.

On November 5, 1959, the Secretary of the Public Services Commission sent through the Controller of Immigration, Federation of Malaya, a letter addressed to the applicant as "Assistant Passport Officer *on Probation*" (my italics). It reads as follows:

"SUROHANJAYA PERKHIDMATAN AWAM,
(PUBLIC SERVICES COMMISSION),
YOUNG ROAD,
KUALA LUMPUR.

Our Ref: P.S.C. 6559/3/11.

5 November, 1959.

CONFIDENTIAL

Sir,

I am directed to inform you that following a report from the Controller of Immigration, Federation of Malaya, concerning your conduct, likely to bring the public service into disrepute, in connection with the irregular issue of some 45 Federation of Malaya passports while you were attached to the Passport Section of the Immigration Office, Kuala Lumpur, disciplinary action is being taken against you under G.O.D. 32 with a view to your dismissal on the charge stated in the attached schedule and appendices.

2. I am to invite you to submit any representations on which you may wish to rely to exculpate yourself within 14 days of receipt of this letter.

3. Please acknowledge receipt of this letter.

I am, Sir,
Your obedient servant,
(Sgd.) J. R. H. Chalmers
for Secretary
Public Services Commission.

Mr. M. Coelho,
Assistant Passport Officer on Probation,
Through: The Controller of Immigration,
& Federation of Malaya,
copy to: Penang.

(Sgd.) Khew Kon Yong.
f. Controller of Immigration,
Federation of Malaya.
November 6, 1959."

The charge above referred to alleged gross neglect of duty in failing to carry out departmental instructions in connection with the issue of four Federation of Malaya passports to persons who were resident in Singapore, thereby rendering the applicant liable to dismissal in accordance with Regulation 32 of the Public Officers (Conduct & Discipline) Regulations, 1956.

On November 14, 1959 the applicant sent in his reply denying the charge and setting out at great length facts and circumstances in exculpation, and requesting in conclusion an opportunity of being heard in person before any further proceedings were taken or decision made.

On December 24, 1959 the respondant's decision was conveyed to the applicant in the following letter:

"SUROHANJAYA PERKHIDMATAN AWAM,
(PUBLIC SERVICES COMMISSION),
YOUNG ROAD,
KUALA LUMPUR.

24 December, 1959.

Our Ref: PSC. Conf. 6559/3/20

CONFIDENTIAL

Sir,

I am directed to refer to this office's letter to you under reference PSC. Conf. 6559/3/11 dated 5th November, 1959, and to your reply thereto dated 14th November, 1959.

2. I am to inform you that after due consideration of your representations and the circumstances of the case, the Public Services Commission has decided that you should not be dismissed.

3. I am, however, to inform you that the Commission has decided that your appointment on probation be terminated forthwith by payment of one month's salary in lieu of notice.

I am, Sir,
Your obedient servant,
(Sd.) (J. R. H. Chalmers)
for Secretary,
Public Services Commission.

Mr. M. Coelho,
Assistant Passport Officer on Probation.
Through: The Controller of Immigration,
Federation of Malaya,
Penang.

(Sd.) Khew Kon Yong.
f. Controller of Immigration,
Federation of Malaya."

The applicant now moves the court for an order of *certiorari* to quash the said decision on the grounds of error in law, want of jurisdiction and failure in observing the principles of natural justice.

The gist of the contention of counsel for the applicant, as I understand it, is that the offer, as communicated to the applicant and accepted by him, constituted a contract which precluded the respondents from terminating his services in the manner that they had chosen. The argument *per contra* on behalf of the respondents is that there never was any *consensus ad idem* — assuming that the applicant had had in fact any misconception as to his appointment being otherwise then as a probationer in the first instance.

The issue, therefore, appears to me to be purely and simply one of construction. There being no parole agreement, what I have to determine is whether on the documents before me I am satisfied that there was a contract; and if so, whether the applicant was by the terms thereof taken into service on probation. The material documents are the invitation to applicants contained in the *Malay Mail,* and the copy letter of June 27, 1957 from the State Secretary, Perak to Mr. Bigley which was shown to the applicant.

In the construction of contracts in writing it is undoubtedly true that the intention of the parties must be objectively sought from the writings themselves. The *Malay Mail* advertisement was an invitation to qualified persons to apply. The resulting applications were offers. Such offers could either be accepted simply or with the imposition of conditions as terms of the contract, additional to those set out in the advertisement. In the latter case the offers by the applicants would have been met by counter-offers which the offerers could accept or refuse. Mr. Bigley's letter did not — as a counter-offer should — ask whether it was accepted or not. In this case I am of opinion that the information conveyed to the applicant was an unqualified acceptance, and he so understood it. There was no question of his appointment being on probation, or for any period of probation. The copy letter of June 27 was headed "Appointment of Mr. Meredith Coelho, Health Inspector, Tanjong Malim, as Assistant Passport Officer in Oversea Missions of the Federation of Malaya Government". The minutes on the copy sent to the Town Board Chairman said nothing about enclosing a copy of Mr. Bigley's letter of June 3, and a subsequent letter on the record, dated February 22, 1960 from the State Secretary Perak to Mr. Bigley confirm that "The Chairman Town Board, Tanjong Malim now informs me that he is unable to trace evidence to confirm that the conditions were brought to the notice of Mr. Coelho." I am therefore entirely satisfied that the applicant's offer to join the Oversea Missions had been accepted unconditionally and was so understood by him when he did join the service.

The breakdown in the transmission of Mr. Bigley's message in proper form to the applicant was an unforseeable accident for which the latter should in no way be held responsible. The fault lay rather with those whose duty it was to convey the message in ungarbled form. This could very easily have been done by attaching a copy of Mr. Bigley's letter to the copy reply thereto sent to the Town Board Chairman, which clearly had not been done. In the result this case is indistinguishable from one where an unqualified acceptance of an offer is communicated to the offerer, but with a secret mental reservation by the offeree. I fail to see how such mental reservation or some other tacit misunderstanding should be permitted to destroy the contractual obligation.

The mistake in this case does not in any event render the contract void *ab initio*. With respect I would follow what Denning L.J. (as he then was) said in *Solle* v. *Butcher*.[1]

> "All previous decisions on this subject must now be read in the light of *Bell* v. *Lever Bros.* The correct interpretation of that case, to my mind, is that, once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty in the same terms on the same subject-matter, then the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground. Neither party can rely upon his own mistake, to say that it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew that he was under a mistake. *A fortiori*, if the other party did not know of the mistake but shared it."

I am therefore of opinion that in purporting to terminate the applicant's service in the manner applicable to officers on probation, the respondents were acting *ultra vires*. Had he been given

the opportunity of being heard before the decision was made to terminate his appointment, then it would not have mattered one farthing whether the applicant was or was not on probation when his appointment was terminated. The respondents, however, had elected to treat the applicant as a probationary officer. In that view they were wrong. I accordingly hold that the applicant should be granted *ex debito justitiae* the order that he seeks, and costs.

*Order granted.*

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## THE SOUTH BRITISH INSURANCE CO. LTD. v. HAJI ISMAIL; SIN KEK YEOW, INTERVENER

**[O.C.J. (Hepworth J.) December 3, 1963]**
**[Penang — C.S. No. 123 of 1960]**

*Practice and Procedure—Judgment by default—3rd party intervening to set aside judgment—Principles applicable—R.S.C. 1957, O.27 r.15—Whether motion proper procedure.*

*Insurance—Road Traffic Ordinance, 1958, ss. 75 and 80—3rd party risks—Non-disclosure of material facts—Avoidance of policy.*

By a proposal form and declaration dated November 11, 1958, the defendant requested the plaintiffs to issue him a policy of insurance in respect of liability to third party risks in respect of motor car AA. 7919. The defendant in answer to questions in the proposal form stated that he was the owner of the vehicle and that it was registered in his name. The plaintiff thereupon issued him a policy covering the period November 11, 1958 to November 10, 1959.

On September 25, 1959 the motor car was involved in an accident in which one of the passengers, WPS, was killed and various others injured. On June 29, 1960 the plaintiffs took out this suit to obtain a declaration that the policy was void for non-disclosure of material facts and for an absence of insurable interest. Judgment was obtained by the plaintiffs in default of the defendant's appearance. In the affidavit filed by the plaintiffs in support of the motion for judgment, it was stated that the motor car concerned was sold by the defendant to one WF on December 4, 1958.

Subsequent to the issue of this writ but prior to judgment, the applicant as administratrix of WPS, deceased, brought an action against the defendant and two others for damages arising out of the accident. The suit was heard on September 25, 1963 and the applicant obtained judgment against the defendant for $31,000 and costs. The plaintiff company refused to pay. The applicant applied under Order 27 r.15 for liberty to intervene and to set aside the judgment by default.

**Held:** (1) Order 27 r. 15 gives a completely unfettered discretion to the Court to set aside a judgment by default. No time limits of any kind are prescribed;

(2) persons although not parties to an action if they are the persons aggrieved by the judgment in that action are entitled to an order setting aside that judgment and giving them leave to enter an appearance in the action in the name of the defendant or in their own name and to deliver a defence;

(3) on the merits of the case, the defendant had not obtained the policy by non-disclosure of material facts as what was stated was true at the time the policy was obtained and accordingly, the judgment dated June 23, 1961 must be set aside.

*Cases referred to:—*

(1) *Leong Han* v. *Kupusamy* [1959] M.L.J. 95.

(2) *Windsor* v. *Chalcraft* [1939] 1 K.B. 279.

(3) *Evans* v. *Bartlam* [1937] A.C. 473.

APPLICATION UNDER O. 27 r. 15.

*N. Sharma* for the Intervener-applicant.

*Chin Yew Choe* for the plaintiffs.

Defendant in person, absent.

*Cur. Adv. Vult.*

**Hepworth J.:** This is an application under Order 27 rule 15 for liberty to intervene in this suit and set aside the judgment by default contained in an order of court dated the 23rd June, 1961. The plaintiffs in that suit are the South British Insurance Co. Ltd (hereinafter referred to as the company) and the defendant is one Haji Ismail bin Haji Jaffar (hereinafter referred to as Haji Ismail).

The facts of the case are as follows. By a proposal form and declaration dated the 11th November, 1958, Haji Ismail requested the company to issue to him a policy of insurance in respect of, *inter alia*, liability to third party risks in respect of Vauxhall Wyvern saloon motor-car bearing registration number AA. 7919. The said proposal form and declaration contained questions as to whether Haji Ismail was the owner of the vehicle proposed for insurance and whether it was registered in his name and his answer to both questions was in the affirmative. In reliance upon the proposal form and declaration and the truth of the representations contained therein the company issued to Haji Ismail a policy of insurance and agreed thereby for the period of one year from the 11th November, 1958, until the 10th November, 1959, that it would indemnify him against liability to third parties. It was an express provision of the said policy that the said proposal form and declaration should be the basis of the said policy and should be duly incorporated therein. In pursuance of the said policy and in accordance with the provisions of the law the company issued a certificate of insurance. As the company stated in their statement of claim that the period covered by the policy was from the 11th November, 1958, until the 10th November, 1959, it is reasonable to assume that a certificate of insurance was delivered by the company to Haji Ismail on or about the 11th November, 1958.

The motor-car No. AA. 7919 was involved in an accident on the 25th September, 1959. On this date Haji Ismail was the registered owner of the vehicle and also the holder of a public service vehicle licence in respect thereof. On that date the policy issued by the company to Haji Ismail was still in force.

As a result of the accident the motor-car